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Supreme Court, U.S.
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No. 85-2030

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SAUNDRA J. ROLAND and
RONNIE J. ROLAND - - - - Petitioners

versus

PAUL H. KLINGENBERG, M.D. - - - Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of the United States has jurisdiction to review a judgment of the Kentucky Supreme Court, where no federal question was presented in the court of first instance nor thereafter in the state appellate process.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Argument	2–3
Conclusion	4

TABLE OF AUTHORITIES

Cases: PAGE

F. G. Oxley Stave Company, etc. v. *County of Butler, et al.*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709 (1897) 3

Webb v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) 3

Statute:

28 U.S.C. sec. 1257(3) 2

Rule:

U. S. Supreme Court Rule 21(h) 2

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v.

PAUL H. KLINGENBERG, M.D. - - - *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners filed suit against respondent on July 12, 1983 in Kenton County (Ky.) Circuit Court alleging injuries from medical malpractice which occurred in October, 1971. The Circuit Court entered Summary Judgment dismissing the case because of the Statute of Limitations. Appeal was taken to the Kentucky Court of Appeals, which affirmed the decision of the Circuit Court. A motion for Discretionary Review was filed with the Supreme Court of Kentucky, which denied discretionary review.

At no stage of the proceedings was a federal question raised or mentioned, either in pleadings, briefs, arguments or in the decisions of any of the Courts.

ARGUMENT

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). Respondent believes that no Federal question is presented and thus the Supreme Court of the United States does not have jurisdiction. Whether the Kentucky Statute in question violates the 14th amendment to the United States Constitution is first raised in the Petition for Writ of Certiorari to this Court.

The issue was not raised in the pleadings nor in the argument before the Kenton County, Kentucky, Circuit Court, which dismissed the claim under Kentucky's Statute of Limitations.

The issue was not raised nor considered before the Kentucky Court of Appeals which affirmed the decision of the Kenton Circuit Court. It was not raised in the Petition for Discretionary Review before the Kentucky Supreme Court which decided that it would not review the decision of the Kentucky Court of Appeals.

Petitioners have failed to comply with rule 21(h) of the Rules of the Supreme Court of the United States simply because petitioners are unable to specify any stage in the proceedings either in the Court of first instance or in the Appellate Court at which the Federal question sought to be reviewed by this Court, was raised.

It is a long-settled rule that the jurisdiction of the Supreme Court of the United States to re-examine the final judgment of a State Court can arise *only* if the

record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the state system. *Webb* v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981).

Averments of a Federal question to give jurisdiction to the Supreme Court of the United States to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case to the Supreme Court from the State Court intended to assert a Federal right. *F. G. Oxley Stave Company, etc.* v. *County of Butler, et al.*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709 (1897).

In reviewing the appendices included in the petition herein, it is apparent that the 14th amendment to the U. S. Constitution or words which would import reliance thereon are not mentioned. Only references to Kentucky's constitution are included. Even then, petitioners state that it is not necessary for the Court to rule on the Kentucky Constitutional issue because of numerous other reasons set forth. (See Petition, appendix D, page 9a and appendix E, page 11a.) Thus, petitioners have even waived any claim that the Kentucky Statute of Limitations violates the Kentucky constitution, not to mention the Constitution of the United States of America.

CONCLUSION

Simply said, the petition fails to disclose that a Federal question is presented to the Supreme Court for review, since no Federal question was presented at the

Trial Court level nor in either of the Appellate Courts of Kentucky. The jurisdiction of the Supreme Court of the United States thus is not properly invoked. The Petition for Writ of Certiorari should be dismissed for lack of jurisdiction.

Respectfully submitted,

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